No. 2654

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIAS MARSTERS AND E. F. LAKIN, APPELLANTS,

vs.

UNITED STATES OF AMERICA, APPELLEE.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Southern Division.

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United States Attorney, District of Idaho.
J. R. SMEAD,
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B. E. STOUTEMYER,
Counsel, U. S. Reclamation Service.
Attorneys for Appellee.

CAPITAL NEWS JOB ROOMS, BOISE

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STATEMENT OF THE CASE.

The Boise river is a stream flowing through Southern Idaho, from which the United States Reclamation Service diverts water for the irrigation of what is known as the Boise-Payette Project.

There are 134 appropriators whose rights are prior in time to the rights of the United States.

There is no decree of any Court fixing the amounts of water to be taken from the Boise river, respectively, by the various appropriators. In 1902, an action was commenced in the District Court of the state for this purpose and a decree was entered in such Court in January, 1906. From an order denying a motion for a new trial in that cause, an appeal was taken to the Supreme Court of the State of Idaho, on the hearing of which appeal the Supreme Court reversed such judgment and sent the case back to the District Court for a new trial.

Farmers Co-Op. Ditch Co. vs. Riverside Irrigation District et al, 16 Ida. 525, 102 Pac. 481.

As the matter now stands, the only thing adjudicated is the dates of priority, that is to say, the order in which the various appropriators shall be allowed to take water from said river. The *amount* which each may take in his turn is in no wise decreed or determined. The United States was not a party to this action. No action has ever been brought in any Court to determine the amount of water to which the United States may be entitled as against the various prior appropriators.

The case in State Court, just referred to, has been pending therein ever since the reversal by the Supreme Court and during each season the Court has, by agreement among the parties, made a temporary order covering the latter half of the irrigation season, to the effect that each party shall be allowed in his turn six-tenths of a miner's inch of water for each acre of land by him irrigated.

During the irrigation season of 1913, up to July 11th of that year, the United States and these prior appropriators agreed among themselves as to the amounts of water which they would take from the river. On July 11th appellants, assuming to act as appointive executive officials of the State of Idaho, went upon the property of the United States and proceeded to turn out of the Government canal the greater portion of the water which the Reclamation Service was taking through said canal for the purpose of irrigating the lands in said Boise-Payette Project. At the time of so doing, there was no statute or other law in effect in the State of Idaho authorizing either a water commissioner or a watermaster to determine how much water should be taken from a given

stream by a given appropriator, except certain statutes effective only on the condition precedent that there should be as to such stream and such water rights therein a decree of a Court of competent jurisdiction fixing the priority of such water rights and the amount of water which each appropriator in said stream should be allowed, in his turn, to divert.

Said appellants continued so to interfere with the United States water right from July 11th until the end of the irrigation season. To do this, they placed armed guards at the waste gates who took turns in maintaining an armed watch thereover and who housed themselves and prepared their meals in a government building standing on government land adjacent to such waste gates. In initiating said interference with the government's waste gates, appellants went upon the government property referred to, cut various and sundry locks by which the gates in question were fastened in place, in order that they might be able to raise such gates, and so regulated the flow of water in the government canal as they chose.

No resistance was offered to these actions although protests were made, but the United States authorities in charge of the Reclamation Service, on July 12, 1913, filed in the District Court of the United States, for the District of Idaho, a bill in equity praying that appellants be enjoined from assuming and maintaining such control over the property of the government, and praying, as supplementary thereto, for damages which might be incurred by the government on account of such interference with its water rights and other property.

Upon a trial on the merits thereof, had on the 10th day of June, 1915, the learned Judge of said District awarded damages to the United States, appellee herein, in the sum of one

thousand ($1000.00) dollars. From such judgment this appeal is prosecuted by defendants in that action, appellants here.

ARGUMENT.

In presenting our argument, we will follow the same general method of subdividing the same as that adopted by appellants, except that we will, in some instances, group two or more of appellants' subdivisions under one head herein, as we shall designate as our argument proceeds.

I.

Under this, the first subdivision of our argument, we will discuss the same phase of the case dwelt upon in the first subdivision of appellants' brief, which, in that brief, commences at the bottom of page 18.

The entire argument there advanced by appellants is premised upon the proposition that at the time their actions complained of by appellee were committed, there was a valid and subsisting decree adjudicating the water rights in the Boise River of the respective water users thereof. In fact, the greater portion of the argument in appellants' brief, not only in the first subdivision thereof, but in other portions of the brief as well, is predicated upon the same proposition. In support of their argument, appellants refer this court to *Farmers Co-Operative Ditch Co.* vs. *Riverside Irrigation District, et al.*, 14 Ida. 450, 94 Pac. 761, and to the case of the same title in 16 Ida. 525. Appellants contend that in the latter of the two opinions cited (16 Ida. 525) the Supreme Court of Idaho specifically affirmed the respective rights and priorities of the various water users whose rights were litigated in that case.

That the findings of the trial court in that case were neither reversed or modified by the opinions of the Supreme Court of Idaho above cited. That the result of the Supreme Court's order that a new trial be had for the purpose of determining the "duty of water" was merely to the effect that jurisdiction was retained in the lower court *to modify* its findings in that regard. That by its opinions the Supreme Court intended that the "status of the waters of the Boise river should be regarded as absolutely fixed and adjudicated according to the decree rendered by the trial Court in the case referred to, unless, and until, the said trial Court should modify the said decree after the taking of further evidence on the question of the duty of water."

In other words, appellants advance the proposition that the Supreme Court affirmed the findings and judgment of the trial court, but sent the case back with the suggestion, merely, that the Trial Court take further evidence in the matter of the duty of water and that he change his findings and judgment in that regard if, in his opinion, it should seem proper to do so. At the threshold, such a procedure, if introduced, would be a novel departure indeed. That a Court of last resort should affirm the decree of a lower Court, and, in the same breath, confer upon that lower Court the power to reverse or modify in its discretion the self same decree, we submit to be a thing unheard of in the annals of jurisprudence. Stripped of all verbiage and argument, the fact is that in the opinion referred to, in 16 Ida. 525, the Supreme Court of Idaho set aside the trial Court's findings as to the "duty of water" in Boise river and ordered that a new trial be had, which new trial should be confined to an inquiry into that phase of the case. By so doing, the *decree* of the lower Court was also set

aside, so far as it purported to fix such duty of water. Appellants have quoted certain language used by the Supreme Court of Idaho, in support of their contention on this phase of the case. Referring to the earlier opinion, 14 Ida. 450, a reading thereof will reveal that it involved an appeal taken by the Nampa & Meridian Irrigation District, one of the defendants in the lower Court, and that the questions discussed and decided by the Supreme Court do not in any manner touch upon the "duty of water" or the amount of water to which any, or all, of the various appropriators should be respectively entitled to use. The Court finds, merely that so far as the questions presented by the appellants are concerned, those questions should be resolved against the appellants and that the lower Court's action should be affirmed *in that respect.*

> "There was no error in the action of the court *in this respect.* The judgment should be affirmed and it is so ordered." (Italics ours.)
>
> Farmers Co-Op. Ditch Co. vs. Nampa & Meridian Irr. Dist., 14 Ida. 450, at 461.

In the latter opinion, 16 Ida. 525, the Supreme Court says at page 527:

> *"Judgment affirmed except as to the duty of water, and as to that issue reversed and a new trial ordered."*

and on page 538,

> "The question as to the duty of water under those ditches and appropriations will be re-tried. On a re-trial the Court will hear such competent evidence as may be produced touching the duty of water to be applied to lands in Boise Valley and lying under the various canals taking water from the Boise River. The Court in its decree should also determine and decree what lands are bench and what bottom lands."

And in explaining its reasons for setting aside the trial Court's decree and ordering a new trial, the Court, at page 533, says:

> "The appropriator is allowed to divert water from the stream sufficient to cover the reclaimed acreage under his canal at the rate of one inch or one and one-tenth inches per acre, according as the lands may be bench or bottom lands. The evidence introduced in this case for the purpose of establishing the duty of water under these several canals and appropriations was practically all purely guess-work and of the most unsatisfactory character. One after another of these witnesses testified that he had been using 'about' a certain volume or quantity of water on his land, and he 'thought' it was necessary to have 'about' so much for the irrigation of his land. In nearly every instance when the witness was asked if he had ever measured the water and made tests as to the actual quantity of water used on a given tract of land, he said that he had not. A fair example of the evidence given in this case is that of a witness who testified that he had lived in Boise for forty years, and that he had been acquainted with the irrigation ditches that were built in the early 60's. He said: 'I don't know anything about inches of water * * * I have made no investigation to determine how many inches of water it would take to irrigate an acre of land, either in vegetables or grass land.' The witness followed this testimony by saying he would judge it would take about an inch to the acre. This was true with practically all the witnesses in the case. The trouble with the whole line of evidence given on this subject is that it was for all practical purposes worthless, and was not founded on any actual measurements or tests, but was purely guess-work as to the volume of water that had been used by the several witnesses. What evidence was given from actual tests and measurements shows a less quantity of water necessary per acre and consequently a higher duty for the water. Few of the witnesses appear to have ever seen water measured, or to know how large a stream of water and what grade or pressure it would take to measure a given number of

> inches. The first real and satisfactory tests or measurements that appear to have been made were made subsequent to the decree in this case in attempting to distribute the water in conformity therewith. Since the decree was entered, the water commissioner and water-masters under him have made numerous tests and measurements, and a great number of affidavits have been filed on motion for a new trial. By these affidavits, made by the water commissioner and water-masters and other expert witnesses, it appears that it will be impossible to actually irrigate anything like as large an acreage under the decree in this case as had been previously irrigated by the several appropriators of the waters from this stream. It also appears from the affidavits that it will not be necessary or essential to apply as much water to the lands as this decree calls for."

Following on from the last quoted portion of that opinion on page 534 appears the following:

> "We feel satisfied, however, from an examination of these affidavits and the whole record in this case, that a higher duty may be obtained from the water than that of an inch and an inch and one-tenth, respectively, per acre as provided for in this decree."

And again on page 535:

> "It is the policy of the laws of this state, and it has been so declared from time to time by this court, to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes."

And in its opinion on a petition for re-hearing, which opinion appears immediately following the opinion from which we have just quoted at length, the Court states that it has already set aside the findings of the lower Court to the effect that the duty of water in Boise Valley shall be, "for bench lands, one inch per acre; for bottom lands, one and one-tenth inches per

acre." See 16 Ida. 539. The Court then states that the former opinion, namely, the opinion as to which the rehearing has been asked, is modified in this, that the new trial theretofore ordered shall determine the duty of water on bench and bottom lands only, exclusive of the irrigation of certain town lots, street sprinkling, etc. At the close of this opinion on petition for re-hearing, the Court says:

> "We are satisfied from an examination of the record in this case that the maximum amount of water to be allowed each appropriator *is too much and in excess of the amount that may in any event be necessary* for the successful irrigation of the lands under consideration."

It seems to us that the foregoing should set at rest any controversy as to what the Supreme Court of Idaho decided in the opinion from which we have quoted. However, since, as we have before indicated, the greater portion of appellants' argument is based upon their contention that the opinion just discussed affirmed the findings of the lower Court, it may be proper to inquire into the effect of the granting of a motion for a new trial. Beyond any doubt the Supreme Court of Idaho granted a new trial in the authority under discussion. A motion for a new trial was made by several of the litigants in the case, was denied in the lower court, the appeal was taken from such order denying a new trial, and the Supreme Court reversed that order and by its mandate commanded the trial Court to hold such new trial.

A new trial is strictly a statutory provision.

> People vs. George, 3 Ida. 108, 27 Pac. 680.
>
> Benjamin vs. Stewart, 61 Cal. 608.
> (The California statute is identical with that of Idaho.)

A new trial consists in the re-examination of an issue of fact.

> Idaho Revised Codes, Sec. 4438; Cal. C. C. P., Sec. 656.
>
> People vs. George, *supra.*

> "The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes," etc.
>
> Ida. Revised Codes, Sec. 4439.

From the last citation, it plainly appears that the effect of the granting of a new trial is to vacate and set aside the former decision. Accordingly, the Supreme Court of Idaho in *Caldwell* vs. *Wells*, 16 Ida. 459, 101 Pac. 812, has said:

> "An application for a new trial is directed to the verdict of the jury or the decision of the Court. * * * * * The judgment is based upon the verdict, or the decision of findings of the Court. * * * * * When a new trial is granted, the finding or verdict is set aside, *in which case the judgment must also fall.*"

The opinion from which this last quotation is made was rendered just fifteen days prior to the opinion in *Farmers Co-Op. Ditch Co.* vs. *Riverside Irrigation District*, hereinbefore discussed, and relied upon by appellants. In view of the rule just quoted, which was the settled law of Idaho at the time the new trial was ordered for the purpose of determining the duty of water, it follows conclusively that in ordering such new trial the Supreme Court of Idaho fully intended to set aside the trial Court's findings in that regard and to *reverse the judgment theretofore entered* touching the duty of water. That judgment being thus vacated, there was not, at the time when appellants assumed to regulate the amount of

water to be diverted by the United States Reclamation Service, any judgment or decree in existence determining the amounts to be taken from Boise river by the various appropriators or any of them. It is not contended that any judgment or decree ever was or has been made in that regard other than the judgment which was reversed and set aside by the Supreme Court's order that a new trial be had. Therefore, appellants acted entirely upon their own initiative and were mere tort-feasors who trespassed upon the property of the United States without any authority whatever. Had the lower Court itself attempted to put into force its former decree it could have been prevented from so doing and compelled to follow the mandate of the Supreme Court by an original action in that Court.

American Placer Co. vs. Rich, 8 Ida. 570, 69 Pac. 280.

Kroetch vs. Morgan, 10 Ida. 172, 77 Pac. 19.

The contention of appellants, therefore, comes to this, that the watermaster, a sub-officer of one of the Executive Departments of the State Government, was authorized arbitrarily, and at his discretion, to put into operation a decree which had been reversed and vacated, and which the lower Court itself had no power to enforce and no warrant in law to consider.

It follows from what has been said that the trial Court in the case at bar was eminently correct in saying (Trans., p. 19) that the opinion of the Supreme Court of the State of Idaho fixes *only* the dates of appropriation among the water users on Boise river; that is to say, that the opinion in question determines the order of priority among the various water users and

reverses the judgment in every respect in which it purported to fix the amount of water per acre necessary for irrigation purposes in Boise Valley, or the various amounts to be allotted to the respective water users.

We submit that appellants' contention in this regard should be held to be without foundation.

II.

Under the second sub-division of their argument at page 27 of their brief, appellants insist that their acts were justified by the statutory law of the State of Idaho in force at the time said acts were committed. In support thereof, appellants print in full, on pages 28 to 31 of their brief, Sections 3274 and 3275 of the Idaho Revised Codes, and on pages 32 and 33, Section 3277 thereof, all as amended by the Session Laws of Idaho of 1909 at page 327 thereof.

Section 3274 provides for the division of the State into water districts. Section 3275 provides, among other things, that the water users within one of such water districts may elect a watermaster for the district. Section 3277 provides that said watermaster shall have certain powers and duties in the matter of the distribution of the water supply of such water district. Merely a casual reading of these sections discloses that they, or any one of them, have no application whatever to any streams or other source of water supply except such streams or sources of supply as of which the priorities of appropriation *and use* have been adjudicated by courts of competent jurisdiction. The closing paragraph of Section 3274 as amended is as follows:

> "Provided, that this section shall not apply to streams of water supplies whose priorities of appropriation and

> use have not been adjudicated by the courts having jurisdiction thereof."

That is merely to say, that no water district can be lawfully created except on condition that the public stream or other source of water supply, to which said district is appurtenant, shall have been the subject of a valid judicial decree. It will be further noted that such a decree must establish not only the priorities, that is to say, the chronological order, of various appropriations, but also the priorities of *use*. The priority of use of the waters of a stream means nothing more nor less than that the holder of such priority shall have the right to use a *specified amount* of such water before the next later appropriator can claim any right of use whatever in such waters. It is fully apparent from the authorities cited in the first division of our argument that in the case at bar nothing has been adjudicated concerning the waters of Boise river with the bare exception of the chronological order of appropriation therein. As there pointed out, the Supreme Court of the State reversed the judgment of the lower court and sent the case back for a new trial for the express purpose of determining the "duty of water," the dates of the various appropriations being fixed; that is, the *order* in which the various appropriators were to be allowed to use water from the river. A new trial was ordered to determine how much water should be decreed to be necessary to irrigate one acre of "bench" and one acre of "bottom" lands, respectively. That new trial, as shown by the whole record in this case, has never been had. When it shall be had, a decree will be entered fixing the amount of water to be taken from Boise river for each acre of land owned by the appropriators along the river. That decree will also provide in what order such appropriators shall

divert such water from the river. That is, in effect the decree will establish who may first divert water from the stream for irrigation purposes and how much water he will be entitled to take for each acre of land by him owned. The total amount of water to which he will be thus entitled will be arrived at by multiplying the amount per acre named in that decree by the number of acres of land by him owned. Thus, the decree will fix in each appropriator not only his priority of *appropriation*, but also his priority of *use*. When this is done, Section 3274 may properly be relied upon by the Board of Irrigation as authorizing it to establish water districts in the territory irrigated by the Boise river. But until such a decree, establishing *both* the priority of appropriation and the priority of *use*, shall have been made, it is manifest that the statute does not authorize the creation of such water districts.

It follows from what has just been said that there was not, at the time when appellants assumed to shut off the water then being diverted by the Reclamation Service, any lawfully authorized water district in existence in the territory supplied by the waters of the Boise river. There was, and is now, no valid decree touching the all-important matter of *use* of such waters among the appropriators, and therefore, under the plain proviso of Section 3274, that statute did not in any way apply to the territory watered by Boise river. Such being the case, there was, under Section 3275, no authority for the election of the watermaster. That section provides that "all persons owning or having the use of an *adjudicated* right in the waters of the stream of water supply comprising *such* district" shall meet and elect a watermaster. Since the conditions were such that a water district could not lawfully be established in the territory in question, it follows that there was no warrant

in law for the election of a watermaster for that territory. The statute uses the words "*such* district". It must be read in connection with Section 3274 immediately preceding it. The word "such" refers to the Districts authorized to be created by Section 3274, and since there was no lawfully created district there could be no lawful election of a watermaster. In further proof of what we have just submitted, Section 3275 provides that the watermaster shall be elected *for such* water district. This is for the water district mentioned in the preceding section, and no other. And further, Section 3275 provides that each person present shall be entitled to one vote provided that he own or have the use "of any *adjudicated right equal to ten* (10) *inches of water*" in the stream supplying such district and also that stockholders in corporations shall be entitled to as many votes as he shall have units of *ten inches* of water "*regularly adjudicated.*" Certainly it cannot be contended, in the face of the reversal of the State trial court's judgment by the Idaho Supreme Court, that any water user of the Boise river had *adjudicated* to him ten inches, or any other amount, of water. That phase of the trial court's decree was particularly and specifically the ground of reversal. There was at the time of appellants' interference with the Reclamation Service headgate, no decree, nor any other order of any Court, (App. Brief, p. 9) in force touching the question of the respective *amounts* of water to be apportioned among the several appropriators, nor any decree or order establishing the *amount per acre* to be used upon the lands under irrigation. It follows that the conditions precedent to the application of Sections 3274 and 3275 of the Idaho Revised Codes had not been fulfilled, and, therefore, these sections have no bearing upon the case at bar.

The same is true of Section 3277. A reading of that section, so much relied upon by appellants—in fact, it is their entire justification and defense—will show that the watermaster therein referred to means the watermaster to be elected under Section 3275, by the persons each owning an adjudicated water right equal to ten inches of water, in the water districts to be established pursuant to the conditions of Section 3274. What we have already said applies with equal force to Section 3277. The watermaster's authority all depended upon the existence of the conditions laid down in Section 3274. These conditions being absent, there was no water district, and, therefore, no watermaster. The fact that he, together with the state authorities, considered himself as having such title, does not alter the fact that, as a matter of law, both district and master were non-existent.

Appellants contend that the trial court in the case at bar committed prejudicial error because it appears from his opinion rendered on demurrer that he quoted to some extent from Sections 3274, 3275 and 3277 as they were enacted by the adoption of the Idaho Revised Codes by the Legislature of 1909, and did not take into consideration the fact that the same Legislature, a few weeks later, re-enacted the statutes in amended form. It is true that the trial court did confuse those statutes. Possibly he did not take into consideration the proclivity of the Idaho Legislature in the matter of amendments; probably he assumed that having adopted the Revised Codes at the opening of the session in January, 1909, the Legislature had been content to let those statutes stand for at least the brief sixty day period which the law prescribes as its session. In any event, by a comparative reading of the statutes as they appear in the Revised Codes and in their amended form

in the Session Laws of 1909, it will appear that no prejudicial error was committed in confusing the two. The statutes in amended form merely make more definite and specific what was undoubtedly their plain intendment as they were originally enacted. When the original statutes were enacted in 1903, they being then identically as they appear in the Revised Codes of 1909, (see Historical Foot Note to Secs. 3274, 3275 and 3277 Ida. Revised Codes), the obvious intent thereof was that the various localities, each irrigated by a public stream or source of supply, should be respectively made water districts as fast as the rights of the water users in said localities should be adjudicated by the courts of the State. It most certainly was not the intent of the Legislature, to vest arbitrary discretion in the matter of regulation of water rights, in a sub-executive officer such as a watermaster or water commissioner. The statutes, as amended by the Session Laws of 1909, as we have already fully pointed out, only make this intent more specific and definite. Also, it appears that the opinion on demurrer was rendered October 11, 1913, (Trans., p. 19) while the trial on the merits was had in the summer of 1915 (Trans., p. 79). It is not to be presumed that the court was under any misapprehension as to the condition of the Idaho statutes at the time of the trial. He was undoubtedly informed of their amended condition. Therefore, appellants were not in any way prejudiced by the court's original confusion of the statutes. In fact, what he said concerning the statutes in his opinion on demurrer is equally and more forcibly applicable to the amended statutes than to the originals.

Appellants contend that they were not only acting "in the rightful exercise of their official discretion," but that they

were carrying into effect the positive "mandate of the law." (Brief, p. 35.)

We have already shown by an analysis of the statutes in question, that an adjudication of the water rights on a given stream is an indispensable condition precedent, not only to the authority and duties of a watermaster, but to the very existence of a water district and of the watermaster himself. If appellants mean to say, by the statement in their brief just referred to, that the watermaster derives his authority from the statutes referred to *without* the existence of any judicial decree, a further conclusive answer can be made to their contention. If the statutes mean what they construe them to mean, they are plainly unconstitutional in that they vest in the watermaster the power to deprive a water user of property without due process of law. In the absence of a judicial decree, the only construction of these statutes by which they could become operative, is that the watermaster is authorized to deliver, or to refuse to deliver, water to a given water user, in his own discretion. He is advocate, judge and jury. Apparently appellants were driven to this conclusion by the force of their own argument, when they say, at the top of page 35 of their brief, and on the next to the last page thereof, that the watermaster was authorized to close the headgates of the Reclamation Service, *if in his judgment* he found it necessary.

> The right to use water for a beneficial purpose is a property right.
>
> Montpelier Mill Co. vs. Montpelier,
>
> 19 Ida. 212, 113 Pac. 741.

A water right is real property appurtenant to the land irrigated thereby.

Taylor v. Hulett, 15 Ida. 265, 19 L. R. A. (N. S.) 535, 97 Pac. 37.

Neilson v. Parker, 19 Ida. 727, 115 Pac. 488.

Gard v. Thompson, 21 Ida. 485, 123 Pac. 497.

In view of the foregoing citations, stating the law under which water rights are characterized and exercised in Idaho, we respectfully inquire, since when, and pursuant to what principle of English law, has it been held that a party's real property rights may be determined, and their exercise be controlled, by a minor executive officer?

Concerning the power of the State Legislature to provide for the arbitrary regulation of property rights without proper notice to the owners thereof and without proper judicial proceedings, the Supreme Court of Idaho has said:

"There is no doubt that the Legislature has power to regulate, to a certain extent, the use of private property under what is denominated the police power of the State. But under the act in question it has attempted to go beyond its legitimate police power and sought to *determine* private rights to private property, without due process of law, which it is prohibited from doing by the fourteenth amendment of the Federal constitution and that provision of our State constitution which provides that no person shall be deprived of life, liberty or property except by due process of law. If we were to concede that said provisions were intended as a police regulation, we could not permit the *settlement of adverse interests or titles to private property* without reasonable notice to the parties interested." (Italics ours.)

Bear Lake County v. Budge,
9 Ida. 703.
75 Pac. 614.

A reading of the last cited case will disclose that the statutes there held to be unconstitutional were far more consonant with the provisions for due process of law than the statutes here under discussion, if they are to be construed as requested by appellants.

> An action to fix the extent and priority of water rights is in the nature of an action to quiet title. *Taylor* vs. *Hullett, supra.*

Under appellants' contention, the power to determine the priority and extent of water rights on the Boise river, which the Idaho Supreme Court has said are real property and the proper subject of an action to quiet title, would be vested in the executive branch of the State government, and the performance of such function delegated to a minor appointive officer.

> The proper procedure to secure relief against interferance with a water right is to initiate proceedings looking to the injunction of the courts against such interference.
>
> Moe vs. Harger, 10 Ida. 302, 77 Pac. 645.

If the appropriators of the waters of Boise river, whose rights were prior to those of the Reclamation Service, were in need of protection from the interference of the Reclamation Service officials, they should have asked a Court of competent jurisdiction to enjoin such interference. Such a proceeding would be "orderly" and outside the "rule of force." even as contended for in appellants' brief. (Page 25.)

> And finally, a watermaster's proper guide in the distribution of the waters of a stream is a *decree* fixing the respective rights of the appropriators therein. It is not his duty to look beyond the decree.
>
> Stetham vs. Skinner, 11 Ida. 374, 82 Pac. 451.

It will be observed that this last case was decided under Section 3275 as enacted in 1903, which section, as we have already pointed out, was re-enacted without change in the Revised Codes of 1909, and which section is not changed as to the purport or effect thereof by the amendment of 1909, but is only made more definite and specific. We take it that under that section, and under section 3277, a watermaster's "duties" and his "powers" are synonymous. If a "power" is granted him, it is his "duty" to exercise such power. The statute performs the double function of defining his powers and of imposing upon him the duty to exercise such powers. Therefore, if, as the State Supreme Court has said in the last cited opinion, it is not his *duty* to look beyond a decree of the water rights under his control, neither is it in his *power* to look beyond such decree. Which is merely to show in another form what we have already said, to-wit: that in the absence of a decree of the water rights in a stream, there is no function for a watermaster to execute, and no provision in law for his existence.

And finally, we again call attention to the fact that *Farmers Co-Op. Ditch Co.* vs. *Riverside Irrigation District*, relied upon by appellants, was reversed and sent back to the Supreme Court for a new trial. As appears from the entire transcript of the evidence in this case, it has been in court ever since, pending such new trial. If the parties to that suit, who were *all* of the appropriators of Boise river whose rights are prior to those of the United States, had wished to form a district and to place the distribution of water in that district in the hands of a watermaster, the courts have been open to them all these years to hold such new trial and to procure such decree, under which a district could properly be formed in which a watermaster could properly act within the provisions of the

statutes in question. Not having done so, they cannot complain because the watermaster is unauthorized to act; in fact, *they* are not complaining. Nor can these appellants claim any immunity from the law which holds them responsible as trespassers and tort-feasors upon the property of the United States.

III.

Under this head we group our argument in reply to subdivision III. and IV. of appellants' brief, pp. 36 and 40.

In sub-division III. of their brief, page 36, appellants contend that the trial court in the case at bar was without jurisdiction to hear the case, on account of the fact that there was pending the state courts the case, already fully discussed, which was intended to procure a decree fixing the water rights of all appropriators of Boise river whose rights were prior to those of the United States. Also, that the trial court, in order to deside this case, was under the necessity of making findings as to the water rights of all of these prior appropriators.

As stated on page 6 of appellants' brief, the United States was not a party to the action in State court referred to. By the most elementary principles of law, it was not, therefore, bound in any way by that action, so far as a determination of the extent of its own rights was concerned. And since the case at bar is based exclusively upon a violation of the rights of the United States, it is idle to talk of the case in State court as being a bar to the prosecution of this action. Further, the United States District Court was the proper forum in which to hear "all suits of a civil nature, at common law or in equity, brought by the United States."

United States Judicial Code, Sec. 24.

The United States would not have been a proper party to the action in State Court, had it been attempted to make it a party. The United States is the sovereign power. The sovereign cannot be sued without specific consent to that effect. There is nowhere to be found the consent of the United States to its being sued in a State Court; and when the United States appears as a party plaintiff, the proper tribunal is the United States Court, as shown by the Section of the Judicial Code above cited. See also *United States* v. *Sayward,* 160 U. S. 493.

So far as a finding of the trial Court in this case as to prior rights in the river is concerned, such a finding, if necessary at all, would be merely incidental and not in any sense an adjudication of the rights of prior appropriators which would be binding upon them. No attempt was made to obtain such a decree, and no such a decree was asked for in the bill. The bill and the supplement thereto merely prayed that defendants be enjoined from interference with the government's water rights, and that damages be given for such interference, if committed (Trans., pp. 15 and 68). There is, therefore, no virtue in appellants' contention that the trial Court was without jurisdiction. Appellants cite on page 39 of their brief the authorities upon which they rely in this regard, to the effect that where two suits involve the *same* subject matter, of which subject matter the State and Federal Courts have *concurrent* jurisdiction, the Court which first acquires jurisdiction will retain it to the end of the litigation. As pointed out, the suit in State Court did not in any way involve the rights of the United States, while the case at bar in Federal Court involved the rights of the United States and nothing else. Therefore, the subject matter is not the same, nor is the jurisdiction concurrent.

In subdivision IV. of their brief, appellants contend that the bill of the United States does not allege that it was rightfully entitled to the water which it was diverting on July 11, 1913, and that, therefore, the bill did not state a cause of action. They cite authority for the proposition that in an *action for damages* for injuries to water rights the plaintiff should allege ownership or right of possession therein. A sufficient answer to this proposition is, that this is an equity suit in which the principal relief sought was an injunction preventing appellants from interfering with the property rights of the United States, and asking that damages be awarded as incidental to the principal cause of action. This is not, therefore, an action for damages. It is a suit for equitable relief. Having taken jurisdiction of the suit for one purpose, the trial Court, under the familiar rule of equity procedure, retained jurisdiction for all purposes, and, therefore, heard the case in the matter of the damages prayed. "Equity does not make two bites of a cherry."

Appellants also contend that the United States has failed to establish its right to the use of the water of which it claims to have been deprived. Without discussing this argument in full, it will be observed that the argument centers about a tabulation appearing on page 51 of appellants' brief. This tabulation purports to show that from July 11th to July 18th there was not sufficient water in Boise river to supply the appropriators whose rights were prior to those of the United States, and that, therefore, the United States was not entitled to the use of any water whatever during that period. The difficulty about this tabulation is, that it is supported by neither the facts nor the law.

In column 5 of said tabulation appear figures which pur-

port to represent the number of second feet to which the appropriators, prior in time to the United States, were entitled during said period. The data for these figures is taken from plaintiff's Exhibit G. Exhibit G is the Stewart decree, which is the decree which was reversed in *Farmers Co-Op. Ditch Co.* vs. *Riverside Irrigation Dist.,* 16 Ida. 525, heretofore discussed (Trans., p. 93). Therefore, appellants have based their statement as to the amount of water to which prior appropriators were entitled before the United States should become entitled to any, on a decree which was specifically reversed and set aside years before the time appellee's cause of action arose. Further, the Supreme Court of Idaho, as before set forth, has said concerning that decree, on which appellants now rely for their data in said tabulation, that they are satisfied that the amounts of water thereby decreed to the prior appropriators in that suit are excessive. It plainly appears, in view of this, that appellants' tabulation contains a gross mis-statement in column 5 thereof.

> It is the settled law of Idaho that the waters of the State available for irrigation purposes shall be subjected, *as a matter of law,* to the *highest* and *greatest* duty *possible.*
>
> VanCamp vs. Emery, 13 Ida. 202, 89 Pac. 752.
>
> Niday vs. Barker, 16 Ida. 73, 101 Pac. 254.
>
> Farmers Co-Op. Ditch Co. vs. Riverside Irrigation Dist., *supra*
>
> Washington State Sugar Co. vs. Goodrich, 27 Ida. —, 147 Pac. 1073.

Therefore, since the waters of Boise river were required by law to perform the greatest possible duty, that is to say, that a given amount of land shall be irrigated by the least possible

water, and since, as before pointed out, the Supreme Court has said that the identical water users to which plaintiff's tabulation refers, in column 5 thereof, are not entitled to the amount of water granted them in the Stewart decree, it follows necessarily that appellants' statement of the amount to which those water users are entitled, being based upon the original Stewart decree, is incorrect, as a matter of both fact and law. We insert herein a table, on the following page, which shows the total flow of water in the river at Highland Station, which station is above the points of diversion of the United States and all other water users on the river, on each day from July 11th to July 18th, inclusive. (See table, columns 1 and 2.) Also the amount which appellants allowed to flow in the government canal on each of said dates. (Column 3.) The total amount available to supply all of the water users whose rights were prior to those of the United States. (Column 4). The total amount to which all of said prior appropriators were entitled. (Column 5). The prior rights which were supplied during said period *by* the government canal. (Column 6). A net total of prior rights to be supplied *otherwise* than by the government canal. (Column 7). The *surplus* of water which would have been flowing in Boise river on each of said dates, after all prior rights *and* the government rights had been supplied. (Column 8).

Columns 1, 2 and 3 in the foregoing table coincide with the same columns in appellants' tabulation. Column 4 coincides with the same column in appellants' tabulation, except that to the amount as given for each day of said period in appellants' tabulation as being available for supplying prior rights, we have added the amount of the additional flow coming into Boise river below the point of intake of the government canal,

1 Date	2 Measured flow at Highland Station	3 Amount in Government Canal	4 Amount Available for Prior Rights	5 Total Amount of Prior Rights	6 Prior Rights Supplied by Govt. Canal	7 Net Total of Prior Rights	8 Surplus After Supplying All Rights
July 11.....	2420 sec. ft.	261 sec. ft.	2159+551 =2710 sec. ft.	1653 sec. ft.	219 sec. ft.	1434 sec. ft.	1276 sec. ft.
July 12.....	2200 sec. ft..	312 sec. ft.	1888+551 =2439 sec. ft.	1653 sec. ft.	249 sec. ft.	1404 sec. ft.	1035 sec. ft.
July 13.....	2100 sec. ft.	344 sec. ft.	1756+551 =2307 sec. ft.	1653 sec. ft.	323 sec. ft.	1330 sec. ft.	977 sec. ft.
July 14.....	1990 sec. ft.	435 sec. ft.	1555+551 =2106 sec. ft.	1653 sec. ft.	452 sec. ft.	1201 sec. ft.	905 sec. ft.
July 15.....	1890 sec. ft.	464 sec. ft.	1426+551 =1977 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	797 sec. ft.
July 16.....	1800 sec. ft.	478 sec. ft.	1322+551 =1873 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	693 sec. ft.
July 17.....	1710 sec. ft.	487 sec. ft.	1233+551 =1784 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	604 sec. ft.
July 18.....	1710 sec. ft.	436 sec. ft.	1274+551 =1825 sec. ft.	1653 sec. ft.	473 sec. ft.	1180 sec. ft.	645 sec. ft.

due to return flow, seepage and tributary flow, which additional amount is not shown in appellants' tabulation. This amount totals 551 second feet as an average for each day covered by the two tabulations. Appellants practically concede the correctness of this estimate of the return flow (App. brief p. 53). They state, however, that this estimate "would be exceedingly liberal" to the United States. This is an error. Not only does the testimony in the transcript, page 132, show this, but also the testimony of A. V. Tallman, not an employe in the government service, but, on the contrary, a special deputy from the State Engineer's office, shows that the return flow into Boise river below the government canal and available to all others, during the month of July runs all the way from 600 to 827 second feet. (Trans., pp. 144 and 115). Such being the case, it is very clear that the total amount available to appropriators whose rights are prior to those of the United States should be arrived at by, first, substracting from the *total* flow of the river, above all of the points of diversion, (Column 2) the amount diverted by the government canal, which is the first canal to take water from the river, (Column 3); and, second, to the remainder thus arrived at must be added the additional amount of water which flows into Boise river below the intake of the government canal, which additional amount is conservatively estimated at 551 second feet. We have, therefore, to quote one instance, on July 11th, 2420 second feet as the total flow of Boise river above all points of intake, minus 261 second feet, the amount allowed by appellants to flow in the government canal on said date, equalling 2159 second feet, the balance of the total flow remaining after the government canal had taken out the stated amount; in addition to this balance there flowed into the river at different points below the

government's point of intake, so as to be available to all other appropriators taking from the river below the government canal, which includes *all* other than the government, 551 second feet; 2159, the said balance, plus 551, the said additional or auxillary flow, equals 2710 second feet, the *total* amount available to supply the appropriators along the river exclusive of the amount allowed to flow in the government canal on said date. We submit that these figures are indisputably correct.

The next inquiry is naturally as to the total amount *reasonably necessary* to supply the rights prior to those of the government. It will be observed that the period of time covered by these tabulations lies in the latter part of the irrigation season. Every year since the reversal of the Stewart decree by the Supreme Court, the appropriators along Boise river had used, during the latter half of the irrigation season, six-tenths of an inch per acre of land. (App. brief, p. 9). Inasmuch as there is no dispute that this amount has been found to be ample for the needs of the appropriators, and in view of the settled law of Idaho, hereinbefore set forth, to the effect that land shall be irrigated with the least possible amount of water, it follows as an inevitable conclusion, first, that these prior appropriators were entitled *only* to the least amount of water necessary for their use, and second, that, as proven by past experience extending over a period of years, six-tenths of an inch per acre was ample for their needs. The Stewart decree fixed one inch per acre. The amount really necessary was, as just pointed out, *six-tenths* of one inch per acre. Therefore, the amount really necessary for all prior appropriators was six tenths of the total amount decreed by the Stewart decree. And since this total amount necessary for prior rights shown in ap-

pellants' tabulation is the total amount allowed by the Stewart decree (App. brief page 52), it follows that appellants' figures in this respect are erroneous, and that to arrive at the correct figures there should be taken six-tenths of 2755 second feet, the amount set forth by appellants, or 1653 second feet, as being the total amount necessary to supply all rights prior to those of the government. Accordingly, our tabulation shows this amount in column 5 thereof.

On each day of the period covered by these tabulations, one of the prior rights was carried through the government canal, to-wit: that of the New York Canal Company. This was done pursuant to the government's contract to that effect with the Canal Company (Trans., pp. 88-90). Therefore, in each day's calculations the amount so carried for the Canal Company should be eliminated from the amount necessary to supply the rights prior to those of the government. Accordingly, we have subtracted the respective amount so carried by the government canal, as shown by column 6 of our tabulation for each day, from the total amount necessary to supply prior rights, which total was 1653 second feet. For instance, on July 11th the government canal carried 219 second feet for the New York Canal Company. This amount subtracted from 1653 second feet leaves, for July 11th, 1434 second feet as the net total amount of water necessary to supply prior rights other than those of the New York Canal Company (Column 7). On the same date, the total amount over and above the amount allowed to flow in the government canal by appellants, *available* for supplying all rights prior to those of the government after deducting the amount in the government canal, was 2710 second feet (Column 4). But after deducting from the total amount necessary to supply all prior rights, 219 second feet,

we found, as shown above, that only 1434 second feet was necessary to supply all remaining prior rights (Column 7). Available for this purpose, we have on the same date 2710 second feet (column 4). There was, therefore, on that date a surplus of 1276 second feet over and above the amount which appellants permitted to flow in the government canal and the total amount necessary to supply all rights prior to those of the government. In the same manner, it is shown by our tabulation that there was a surplus on each day of the entire period. The smallest surplus was on July 17, 604 second feet.

Turning now to the evidence in this case, it is shown that the amount to which the Reclamation Service claimed to be entitled for each day of this period was 980.4 second feet. (Trans., pp. 87 and 97). It will be further noted that the amount to which the government was *prima facie* entitled by the State Engineer's license was 1647 second feet (Trans., See plaintiff's Exhibit E and Trans., p. 97). The government was not claiming a right to divert the total amount for which the State Engineer had issued his permit and license, nor anything like that amount. 980.4 is six-tenths of 1647. Therefore, the government was following the precedent as followed by all other water users along the river for years previous, and was taking only six-tenths of the amount to which it was licensed. This is the same proportion as that to which, as shown earlier in this branch of the argument, others were entitled. Also it will be remembered that out of this six-tenths of its licensed amount the government was delivering to the New York Canal Company all the way from 219 to 277 second feet (Trans., p. 98). It was not, therefore, getting even as much as six-tenths of the amount to which it was licensed. It

was, in fact, getting considerably less than half of that amount for its own use.

Turning again to our tabulation previously discussed, it will be observed that during every day of the period of time covered by that tabulation there was enough water to supply all prior rights with the amount to which they were entitled, and to leave on each day a surplus more than sufficient to furnish the government the difference between 980.4 second feet, which it claimed, and the amount which appellants allowed to run in its canal. For instance, the smallest surplus was on July 17th. On that day the government was allowed by appellants 487 second feet of water. It claimed the use of 980.4 second feet. To make up this amount, it would have been necessary to add to the 487 second feet, actually allowed to run in the canal, an additional amount of 493.4 second feet. Inasmuch as there was enough water in the river to supply all prior appropriators and to leave a surplus of 604 second feet, it follows that out of this surplus the additional 493.4 second feet claimed by the government could have been furnished and still leave in the river a surplus above *all* rights of 110 second feet.

It will be further observed that the amount claimed by the government, 980.4 second feet, was arrived at by an agreement with the prior appropriators, or their attorneys, entered into between them and the officers of the Reclamation Service (Trans., pp. 97, 99, 102). Up to the time that appellants and other State officials arrogated to themselves the right to trespass upon and take charge of the property of the United States, and to place gun men on guard over the same, (Trans., p. 107), the Reclamation Service and the other appropriators along the river were working together in an entirely peace-

ful and orderly manner. The claims of the government were more than fair, inasmuch as the Reclamation Service was taking proportionately much less water than it was willing to concede to the other appropriators. There was, at all times, sufficient water in the river to supply all needs. This is abundantly shown by the foregoing portion of our brief, and while we do not for a moment concede that it was necessary, as a matter of law, to prove the extent of the United States' rights, or anything further than simply possession thereof, in view of the fact that appellants were tort-feasors and intruders without any justification whatever, (see within), yet we submit that it plainly appears from the foregoing that the United States was abundantly entitled to all the water that it was claiming during the period in question.

We wish further to point out, in connection with subdivisions 3 and 4 of appellants' brief, that inasmuch as there was no subsisting decree fixing the rights of use in the waters of Boise river, appellants had no justification under the statutes relied on, as heretofore shown, and that, therefore, they were mere trespassers and tort-feasors. The fact that they claim to have acted under orders is no justification.

> 28 A. and E. Enc. 569. (Second edition).
> Mitchell vs. Harmony, 113, How. (U. S.) 115.

Neither was any advice of the Attorney General's office or of other counsel any defense.

> 28 A. and E. Enc. 561.

As said in *Raleigh vs. Goschen*, 1 Ch. 73,

> "If any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offense, he cannot prevent himself being sued, merely because he acted

> in obedience to the order of the Executive Government or of any officer of State."

Nor is a plaintiff in an action against a mere trespasser under any need to prove his title to the property trespassed upon. Possession being admitted, as in this case, this is sufficient foundation for the action. If the defendant claims title in himself as a defense, the burden of proof in that respect is on him.

28 A. and E. Enc. 601.

Bare possession in a plaintiff is sufficient in an action for trespass to realty against a mere intruder. He cannot, possession being shown, question plaintiff's title.

28 A. and E. Enc., 573 *et seq.*

And authorities there cited.

As said in *Graham vs. Peat*, 1 East. 244,

> "Any possession is a legal possession as against a wrong-doer."

And in *2 Wheat. Selw.* 1018,

> "Even a tortious possession will support trespass against a wrong-doer."

So far as title is concerned the fact was, as shown before, that the United States held a permit and a license from the State Engineer entitling it to the use of 1647 second feet of water. Not only was this water right real property, but the license from the State Engineer was by statute made *prima facie* evidence of the right to use, not 980.4 second feet, but the total amount.

Ida. Revised Codes, Sec. 3262.

This license, while not *conclusive*, was certainly abundant authority to take any amount, up to 1647 second feet, *as against a mere trespasser.*

We submit that in view of the foregoing authorities, which state beyond doubt the established law in the matter of trespass by a mere wrong-doer, mere possession by the government of the water in question was amply sufficient to sustain a judgment for damages against appellants.

IV.

In this subdivision of our argument we discuss the matters dwelt upon in subdivisions 5, 6 and 7 of appellants' brief.

In the opening of subdivision 5 of their brief, appellants make the claim that by reason of the fact that they prevented the bulk of the water claimed by the government from passing through its canal they thereby increased the amount of water flowing down the river so as to be available for use at the government power plant. In support of this contention, they refer to page 87 of the transcript. The testimony at that point merely shows that on July 11th appellants prevented from passing down the government canal 719.2 second feet of water to which the government was entitled.

The facts of this matter are, that the point of diversion from the river into the government canal, that is to say, the headgates of the canal, are immediately *above the* government power plant. About a mile *down the canal* is what is termed a wasteway, running from the canal back into the river. Between the point of diversion, or headgates, and the point where water running through this wasteway again reaches the river, is the government power plant. Therefore, water taken into the

canal at the headgates, carried down the canal to the wasteway, and there diverted from the canal and carried through the wasteway back into the river, is carried *around* the government power plant from a point immediately above the power plant and put back into the river at a point *below* the power plant. It is very evident, therefore, that water thus carried through the canal and the wasteway would never reach the power plant. When it got back into the river through the waste way it would be below the power plant and would very naturally flow on down the stream. The witness Bliss, referred to by appellants in this connection, at page 94 of the transcript, testifies that the interference by appellants with the government's water took place at the point where the wasteway diverts water from the canal and carries it back into the river. He also states:

> "There was water diverted through the main canal and wasted at the Barber wasteway that was of no use to us in our irrigation, that could have gone through the power plant and created more power, provided it was necessary to waste it at all. We have a wasteway in the main canal approximately a mile below the headgates and they regulated the canal at that point rather than at the headgates. If they had regulated it at the headgates, that water would have gone through the power plant. As they did regulate it, it went through the wasteway and the power plant did not get the use out of it. We develop power at the diversion dam, and the act of taking water through the main canal and wasting it out through the wasteway rather than through the power plant deprived us of that much power. This decreased the output of the power plant.
>
> "THE COURT: In other words, more water was taken in at the point of diversion than was permitted to go on down through the canal?
>
> "A. Yes.

"THE COURT: Did you object to that?

"A. It decreased our power that much.

"THE COURT: I say, did you object to that?

"A. At that time? Yes, sir. We called his attention to it at that time."

In this connection, we invite the further attention of this court to plaintiff's Exhibit C, showing the relative location of the canal headgates and the diversion dam there erected to divert water into the canal through such headgates, the power plant, and the United States irrigation system generally.

It appears conclusively from the foregoing that when appellants assumed to interfere with the Reclamation Service water right, they did not regulate the flow into the government canal at the headgates. They let the headgates stand at the same level as formerly, whereby there was diverted into the canal the same amount of water as always. But they did regulate the canal at the point where the wasteway runs out of the canal to the river. At that point they raised the gates to such an extent that the greater portion of the water flowing in the canal was checked and diverted through the wasteway back into the river, allowing to go down the canal to the lands irrigated thereby only the amounts of water shown for each day in column 3 of our tabulation hereinbefore inserted. It follows that the governments contention is correct. If appellants had raised the *headgates* of the canal at the point of intake, there would have flowed into the canal only the amounts as shown in our tabulation. The amount of water prevented from flowing into the canal by raising the headgates would have then flowed on down the river proper and would necessarily have passed through the government power plant immediately below such headgates. On the other hand,

by allowing the full head of water to go down the canal, and then diverting it through the wasteway back into the river, it was taken from the river above the power plant and put back into the river below the power plant, thereby preventing it from flowing through the power plant.

It will be observed that these appellants assumed complete control of the waters of the river, and that, therefore, they should be held liable for all natural and probable consequences of their acts committed in that respect. Thus, they were diverting water from the river above the power plant apparently for the sole purpose of taking it down the government canal and wasting it back into the river at a point below the power plant, and in this manner were depriving the government of the use of that water for power purposes. There is no conceivable reason why this should have been done. It plainly appears, therefore, that not only were the appellants interfering with the water to which the government was entitled for irrigation purposes, but also they were deliberately reducing the flow of the river above the power plant in such a manner as to decrease the flow available for power purposes. It was quite proper that the Court should assess damages for the resulting loss of power, as well as for the loss of water for irrigation purposes. The appellants had tortiously assumed complete control of that section of the river, and they should, as trespassers and tort-feasors, be held liable for all damages proximately resulting from their acts.

As to appellants' further contention in subdivision 7 of their brief, that no measure of damages has been set up by which the Court could properly estimate the same, we refer this Court to pages 108 and 120 of the transcript, also to plaintiff's Exhibit H. It appears from these citations that the

amount of power which would have been developed had the additional amount of water in question flowed through the government power plant, was carefully estimated and put into evidence. It further appears that there was in existence between the United States and a private company a contract for the sale of power at a specified rate. By the testimony of the witness Markus, (Trans., p. 120), it is shown not only that this private company would have taken all of the power which could have been developed from this additional water, but also that they construed the contract referred to as *requiring* them to take all of the government's surplus power. In this connection, see also plaintiff's Exhibits I and J, showing the amount of power lost to the government, and its contract with the private power company above referred to.

As to appellants' contention that no standard was set up whereby the Court could estimate the damages incurred by the government on account of the loss of additional water to which it was entitled for irrigation purposes, see the Transcript at page 90. It is there shown that at the time of appellants' acts complained of, 980.4 second feet of water was not only used but *required* to irrigate the lands taking water from the government canal. This amount had been diverted into the canal up to the very moment when appellants interfered with the gates at the government wasteway. After loss by seepage and evaporation, 65 per cent. of this amount had been delivered to the farmers (Trans. p. 103). For each and every *acre* foot of this so delivered, the government had been receiving 40 cents, (Trans., p. 90). It, therefore, appears that the estimate of the government's damages was a simple proposition of mathematics. The number of second feet of water of which the government was each day deprived by the

unlawful acts of appellants, multiplied by 1.98, gives the same amount in *acre* feet (Trans., p. 90); 65 per cent. of this number of acre feet multiplied by .40 gives, in dollars and cents, the amount which was lost to the government by appellants' acts. This sum was lost to the government because it could not deliver the water to the farmers. A calculation of this amount will show not only that the Court was abundantly justified in assessing damages at $1000, but that this estimate was more than liberal to appellants. In the period of time to which our argument relates, namely, from July 11th to July 18th, inclusive, there were eight days. The government was entitled to the use of 980.4 second feet of water for each day of that period. The total amount of water to which it was entitled for the whole period, expressed in second feet, is therefore arrived at by multiplying 980 second feet by eight. This gives a total for the whole period of 7840 second feet. The amount which the government was allowed by appellants for each day of the period is shown in our tabulation in column 3 thereof. By adding together the different amounts shown in said column 3, we obtain the total amount of water allowed the government by appellants for the whole period. This amount is 3217 second feet. To arrive at the total amount of which the government was deprived for this period, 3217, the amount allowed the government, should be subtracted from 7840, the amount to which it was entitled. This gives 4623 second feet. To reduce this amount to acre feet, it should be mutiplied by 1.98. This gives 9153 acre feet. At 40c per acre foot, the value of this amount is $3661.20. But as shown above, the entire amount of water taken into the canal at the headgates could not, under existing conditions, be delivered to the farmers along the canal. Only 65 per cent

of the entire amount was so delivered. Therefore, the government's damages would not be the total sum of $3661.20, just obtained, but would be 65 per cent of that amount. Sixty-five per cent of $3661.20 gives $2,379.78. This is the true measure of the government's damages from July 11th to July 18th, for its loss of water for irrigation purposes *only*. To this amount should be added its further damages for loss of power, as discussed above. We repeat, that the Court's estimate of damages was more than liberal to appellants.

It will be noted in this connection that we have based our argument entirely upon the period of time between July 11th and July 18th, inclusive. As shown by the testimony in this case, appellants continued their unlawful interference with the government works not only throughout this period, but also for the entire remainder of the irrigation season. This fact makes it doubly apparent that if the government were insisting upon its "pound of flesh," it could very well have insisted upon damages for the loss of water for that entire period, which would have totalled a very large amount of money.

In conclusion, as to the question of damages to be allowed in this case, we call the Court's attention to certain passages from the foremost authority on this subject:

> "There is no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of a cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, no objection is perceived to placing before the jury all the facts and circumstances of the case having

any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit."

Sutherland on Damages, Sec. 70, p. 220.

"A plaintiff in possession under color of title to the fee can recover against a stranger as owner. If the defendant be a mere intruder *he cannot set up title in a third person*, either to affect the cause of action or in mitigation."

Sutherland, Sec. 1012, p. 2962.

CONCLUSION.

In conclusion, we submit that the law of the State of Idaho, even granting that government property would be entirely subjected to such law, does not in any way justify or mitigate the trespass committed by appellants. That the learned trial Judge who pronounced the judgment from which appellants now appeal committed no error prejudicial to appellants, and indulged in no "guesswork" or "haphazard" methods in determining appellee's damages. Appellants' trespass was indefensible and was aggravated by the high-handed actions indulged in, and by the employment of gun men who insolently took possession not only of the government canal, waste gates, and water, but ensconced themselves in the government's building near at hand, where they proceeded to sleep, cook their meals, and generally to make themselves at home while they divided their time so as to maintain a continuous armed watch over the government's property. Such action should not be tolerated by the courts for one moment. It is true that appellants acted under directions from the State authorities, and while this is no defense, the Court has very evidently

taken it into consideration in assessing against them the very smallest damages possible.

In this connection, attention is called to the testimony of the appellant Marsters. His is the only testimony offered by defendants, appellants here, on the trial of this cause. His testimony does not any wise explain, avoid, or mitigate the trespass which had already been proven by the government. In fact, appellants' case would be stronger had he not testified. He says, at page 139 of the transcript, that he has been a farmer and an auctioneer all his life. That he does not "pretend to know how to measure water flowing in a canal. I couldn't tell what number of second feet were flowing in a canal of a certain capacity." He further says that in all of his testimony, in speaking of the rights of prior appropriators, he means their rights under the "Stewart decree." This is the man whom the officials of the State of Idaho put in charge of the government's property. A man who did not even know how to measure water flowing in a canal. Whose only guide and authority is a decree which was reversed by the Supreme Court of the State some four or five years before he assumed to act in the capacity of water master—an office which, under the proven facts in this case, had no lawful existence. In the face of these facts, appellants contend that the government should supinely submit to whatever treatment he chose to accord its property and its servants; submit to the caprice of a man ignorant of the very rudiments of the matter in which he assumed to act; submit to the domination of armed guards. We think that in the face of these facts the position of the government in this matter needs neither apology nor justification.

We submit that the judgment of the trial Court should be affirmed.

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